

**11-2359-cv**  
**Anani v. CVS**

1 UNITED STATES COURT OF APPEALS

2 FOR THE SECOND CIRCUIT

3 August Term, 2011

4 (Argued: June 27, 2012 Decided: September 20, 2013)

5 Docket No. 11-2359-cv

6 - - - - -  
7 SALAH ANANI,  
8 Plaintiff-Appellant,

9 v.

10 CVS RX SERVICES, INC.,  
11 Defendant-Appellee.

12 - - - - -  
13 Before: WINTER, STRAUB, and CHIN, Circuit Judges.

14 Appeal from a grant of summary judgment in the United  
15 States District Court for the Eastern District of New York  
16 (Arthur D. Spatt, Judge) holding a pharmacist exempt from the  
17 FLSA time-and-a-half overtime pay requirement. We affirm.

18 SETH R. LESSER (Fran Rudich, on the  
19 brief), Klagsbrun, Olsen & Lesser LLP,  
20 Rye Brook, New York, for Plaintiff-  
21 Appellant.

22 JAMES J. SWARTZ, JR. (Felice B.  
23 Ekelman, Jackson Lewis LLP, New York,  
24 New York, on the brief), Ashe Rafuse &  
25 Hill LLP, Atlanta, Georgia, for  
26 Defendant-Appellee.

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WINTER, Circuit Judge:

Salah Anani appeals from Judge Spatt's grant of summary judgment dismissing Anani's complaint against CVS RX Services, Inc. ("CVS"). The district court held that appellant was exempt from the Federal Fair Labor Standards Act's ("FLSA") time-and-a-half overtime requirement because of an exemption for highly-paid employees. We affirm.

## BACKGROUND

Appellant was employed by CVS as a pharmacist from 2003 until his resignation in July, 2009. Appellant has stipulated to a two-year statute of limitations, limiting his claim to the period from December 18, 2007 to July 20, 2009. See Anani v. CVS RX Servs., Inc., 788 F. Supp. 2d 55, 58 (E.D.N.Y. 2011). During the relevant period, appellant's base salary was based on a forty-four hour work week (paid bi-weekly). That base weekly salary exceeded \$1250 at all pertinent times. As explained infra, his base salary was guaranteed, and CVS classified him as a salaried employee exempt from the time-and-a-half overtime requirement of the FLSA. See 29 U.S.C. § 207(a)(1).

Appellant also received additional compensation because he invariably, or almost so, worked hours in addition to the base forty-four hours each week. Appellant's additional hours worked usually ranged from 16 to 36 hours per week, increasing his total compensation in each relevant year to over \$100,000. Appellant

1 worked these extra shifts voluntarily.<sup>1</sup> Compensation for the  
 2 extra work -- in excess of forty-four hours -- was paid according  
 3 to an hourly "Compensation Rate" determined by dividing  
 4 appellant's weekly guaranteed salary by forty-four, multiplying  
 5 the number of hours worked over forty-four by the resultant  
 6 amount and then adding "Premium Pay" of six dollars per hour.<sup>2</sup>

7 DISCUSSION

8 There are no material facts in dispute, and our review of a  
 9 grant of summary judgement is, of course, de novo. Lawrence v.  
 10 Cohn, 325 F.3d 141, 147 (2d Cir. 2003).

11 FLSA Section 207(a)(1) provides that employees who work more  
 12 than forty hours in a given week must receive time-and-a-half  
 13 compensation for excess hours except as "otherwise provided." 29  
 14 U.S.C. § 207(a)(1). FLSA Section 213(a)(1) provides an exemption  
 15 from this requirement for "any employee employed in a bona fide  
 16 executive, administrative, or professional capacity." 29 U.S.C.  
 17 § 213(a)(1). To qualify for this exemption an employee's work  
 18 must satisfy both a duties requirement and a salary requirement.  
 19 29 C.F.R. §§ 541.2, 541.300. Appellant concedes that the duties  
 20 requirement, quoted above and amplified by regulations found in  
 21 Subparts B-F of 29 C.F.R. Part 541, is met.

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<sup>1</sup>In his pre-trial deposition, appellant could recall only one instance where he was told that he might be in trouble if he did not agree to work a particular extra shift. See Anani Dep. 89-114.

<sup>2</sup>Appellant also received certain bonus payments not relevant to this appeal.

1       The disposition of this appeal, therefore, turns on the  
2 salary requirement as defined in Subpart G of Title 29, Subtitle  
3 B, of C.F.R. §§ 541.600 through 541.606. C.F.R. § 541.600  
4 provides that to qualify for the exemption, an employee "must be  
5 compensated on a salary basis at a rate of not less than \$455 per  
6 week." 29 C.F.R. § 541.600(a). The term "salary basis" is in  
7 turn defined in C.F.R. § 541.602, which provides,

8       An employee will be considered to be paid on  
9 a "salary basis" within the meaning of these  
10 regulations if the employee regularly  
11 receives each pay period on a weekly, or less  
12 frequent basis, a predetermined amount  
13 constituting all or part of the employee's  
14 compensation, which amount is not subject to  
15 reduction because of variations in the  
16 quality or quantity of the work performed.  
17 Subject to the exceptions provided in  
18 paragraph (b) of this section, an exempt  
19 employee must receive the full salary for any  
20 week in which the employee performs any work  
21 without regard to the number of days or hours  
22 worked. Exempt employees need not be paid  
23 for any workweek in which they perform no  
24 work. An employee is not paid on a salary  
25 basis if deductions from the employee's  
26 predetermined compensation are made for  
27 absences occasioned by the employer or by the  
28 operating requirements of the business.  
29

30       29 C.F.R. § 541.602(a). It is undisputed that, at all pertinent  
31 times, appellant's base salary substantially exceeded \$455 per  
32 week and there were no impermissible deductions. There is also  
33 no dispute that appellant's base weekly salary was guaranteed,  
34 i.e. to be paid regardless of the number of hours appellant  
35 actually worked in a given forty-four-hour shift. The  
36 requirements of C.F.R. §§ 541.600 and 541.602 are thus satisfied  
37 with regard to the minimum guaranteed weekly amount being paid  
38 "on a salary basis."

1       Two further regulations relating to the salary requirement  
2 need to be addressed: C.F.R. §§ 541.601 and 541.604. First,  
3 C.F.R. § 541.601(a), entitled "Highly compensated employees,"  
4 provides that "[a]n employee with total annual compensation of at  
5 least \$100,000 is deemed exempt . . . if the employee customarily  
6 and regularly performs one or more of the exempt duties or  
7 responsibilities of an executive, administrative or professional  
8 employee identified in [the Subparts defining the duties  
9 requirement]."

10       Subsection 601(b) adds refinements, inter alia: (i) under  
11 (b) (1), to be exempt, the employee's "[t]otal annual  
12 compensation" must include \$455 weekly "on a salary or fee  
13 basis," i.e. guaranteed; (ii) under (b) (2), if an employee's  
14 total compensation falls short of an expected total of \$100,000  
15 at the end of the particular twelve-month period, the employer  
16 may, during the next month, make up the difference through an  
17 unearned cash payment; (iii) under (b) (4), the employer has  
18 discretion to choose the dates of the relevant twelve-month  
19 period; and (iv) under (c) a relaxed standard is applied to  
20 determine whether an employee who fulfills the other requirements  
21 of being a "highly compensated employee" also meets the duties  
22 requirement.

23       Subsection (b) thus renders C.F.R. § 541.601 something of a  
24 safe harbor for employers. It gives employers a high degree of  
25 certainty regarding the exemption by allowing them discretion to  
26 designate the relevant twelve-month period and to make up a

1 deficiency (salary less than \$100,000) found at the end of that  
2 period by a payment made within 30 days after the period ends.  
3 Because, as noted, appellant concedes that he received an "annual  
4 base salary" in excess of \$455 per week throughout the relevant  
5 period, earned over \$100,000 annually, and no improper deductions  
6 were made, appellant falls within the C.F.R. § 601 exemption.

7 However, appellant argues that the C.F.R. § 601 exemption is  
8 not applicable because of C.F.R. § 541.604, which governs  
9 circumstances where an "exempt employee's earnings [are] computed  
10 on an hourly, daily or a shift basis" and there is a "[m]inimum  
11 guarantee plus extras." Regarding the "extras," C.F.R. §  
12 541.604(a) states that "[a]n employer may provide [such] an  
13 exempt employee with additional compensation without losing the  
14 exemption or violating the salary basis requirement, if the  
15 employment arrangement also includes a guarantee of at least the  
16 minimum weekly-required amount paid on a salary basis." This  
17 provision allows additional compensation to be computed and paid  
18 in a straight-time hourly amount. Id. ("Such additional  
19 compensation may be paid on any basis (e.g., flat sum, bonus  
20 payment, straight-time hourly amount, time-and-one-half or any  
21 other basis). . . .").

22

23 Appellant argues that the provisions of C.F.R. § 541.604(b)  
24 prevent the exemption from applying to him. That Section states:

25 An exempt employee's earnings may be computed  
26 on an hourly, a daily or a shift basis,  
27 without losing the exemption or violating the  
28 salary basis requirement, if the employment

1 arrangement also includes [the specified  
2 guarantee] . . . and a reasonable  
3 relationship exists between the guaranteed  
4 amount and the amount actually earned. The  
5 reasonable relationship test will be met if  
6 the weekly guarantee is roughly equivalent to  
7 the employee's usual earnings at the assigned  
8 hourly, daily or shift rate for the  
9 employee's normal scheduled workweek.

10  
11 29 C.F.R. § 541.604(b).

12 Appellant's argument is based on Subsection 604(b)'s  
13 condition that "a reasonable relationship exist[] between the  
14 guaranteed amount and the amount actually earned" and "the weekly  
15 guarantee is roughly equivalent to the employee's usual  
16 earnings." Id. Focusing exclusively on that language, he argues  
17 that his total earnings so substantially exceeded his guaranteed  
18 salary -- slightly less than 2 to 1 -- that the relationship  
19 between the guaranteed salary and his total earnings was  
20 unreasonable.

21 We perceive no cogent reason why the requirements of C.F.R.  
22 § 541.604 must be met by an employee meeting the requirements of  
23 C.F.R. § 541.601. Indeed, C.F.R. § 541.601 is rendered  
24 essentially meaningless if a "highly compensated employee" must  
25 also qualify for the exemption under C.F.R. § 541.604 or, to  
26 state the converse, would lose the "highly compensated employee"  
27 exemption by failing to qualify under C.F.R. § 541.604. To be  
28 sure, C.F.R. § 541.604 deals with employees who earn the  
29 "[m]inimum [g]uarantee plus extras," but every employee with a  
30 guaranteed weekly amount exceeding \$455 who earns over \$100,000,  
31 and is therefore purportedly exempted by C.F.R. § 541.601, also

1 fits the description of having a "minimum guarantee plus extras."  
 2 Appellant's interpretation thus renders C.F.R. § 541.601  
 3 superfluous. The reading that gives full meaning to both C.F.R.  
 4 § 541.601 and C.F.R. § 541.604 is that each deals with different  
 5 groups of employees who receive a "minimum guarantee plus  
 6 extras." The first exemption deals with those employees who earn  
 7 over \$100,000 annually while the second exemption deals with  
 8 employees whose guarantee with extras totals less than \$100,000  
 9 annually.<sup>3</sup>

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<sup>3</sup>In any future case with facts similar to the present one but for the employee's failure to earn over \$100,000 (thus rendering C.F.R. § 541.604 applicable), it would be helpful to have the following issues briefed.

First, C.F.R. § 541.604(a) states that it applies where the "employee's earnings are computed on an hourly, daily or shift basis" with a guarantee, while C.F.R. § 541.604(b) requires that a requisite reasonable relationship exist between the guarantee and the employee's "usual earnings at the assigned hourly, daily or shift rate" for the "normal scheduled workweek." An open question is whether this provision requires that the reasonable relationship be between the guaranteed "hourly, daily, or shift" amount reduced to an hourly, daily, or shift rate of pay and the hourly, daily, or shift rate by which pay for extra work is calculated, rather than between the total of guaranteed earnings and total earnings. Relevant to this issue are the Section's two examples: The first example is a worker who is guaranteed \$500 per week for any week in which some work is performed and who usually works four or five shifts at \$150 per shift. 29 C.F.R. § 541.604(b). Such a worker is exempt from the overtime requirement because the rates of pay are reasonably related. The second example is a store manager who is guaranteed \$650 per week and receives in addition a percentage of sales revenue or store profits. Id. Such an employee is not exempt because the additional compensation is not computed on an hourly, daily or shift basis. Id.

Second, the parties should consider briefing the effect, if any, of the words "normal scheduled workweek" in a case where the amount of hours worked varies each week according to the employee's voluntary decision to work extra hours.

1           Appellant's sole argument regarding C.F.R. § 541.601 is that  
 2 it is intended only to provide a relaxed standard as to  
 3 determining the duties requirements for employees who earn over  
 4 \$100,000. However, that reading is unsustainable. First, the  
 5 regulation is found in the "Salary Requirements" Subpart rather  
 6 than in the "duties requirements" Subparts, and there is direct  
 7 evidence that this placement was not the result of administrative  
 8 inadvertence. The "Introductory statement" in C.F.R. § 541.0,  
 9 quoted in the margin,<sup>4</sup> explicitly states that the "exemption[s]"  
 10 defined in Part 541 are "from the Act's minimum wage and overtime

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<sup>4</sup>That provision states in relevant part:

Introductory statement  
 (a) Section 13(a)(1) of the Fair Labor Standards Act, as amended, provides an exemption from the Act's minimum wage and overtime requirements for any employee employed in a bona fide executive, administrative, or professional capacity . . .  
 . .

(b) The requirements for these exemptions are contained in this part as follows: executive employees, subpart B; administrative employees, subpart C; professional employees, subpart D; computer employees, subpart E; outside sales employees, subpart F. Subpart G contains regulations regarding salary requirements applicable to most of the exemptions, including salary levels and the salary basis test. Subpart G also contains a provision for exempting certain highly compensated employees. Subpart H contains definitions and other miscellaneous provisions applicable to all or several of the exemptions.

29 C.F.R. § 541.0.

1 requirements" and that Subpart G's definition of salary  
2 requirements includes an "exempt[ion] [for] certain highly  
3 compensated employees." Second, to guild the lily, the language  
4 of C.F.R. § 541.601(a) plainly states that it is providing an  
5 overall exemption from the time-and-a-half requirement to  
6 employees who meet the relaxed duties requirement based on an  
7 annual salary of over \$100,000. Therefore, the very structure  
8 and express language of C.F.R. § 541.601 indicate that its  
9 purpose was to relax the duties requirement in order to exempt  
10 employees from the time-and-a-half requirement because they earn  
11 over \$100,000 annually.

12 CONCLUSION

13 For the reasons stated above, the exemption from the time-  
14 and-a-half requirement applies to appellant, and the judgment of  
15 the district court is affirmed.